

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
A & J AUTO REPAIR CORPORATION	:	ORDER
AND ARISMENDI BLANCO, AS OFFICER	:	DTA NO. 807021
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and	:	
29 of the Tax Law for the Period March 1, 1984	:	
through February 28, 1987.	:	

Upon petitioner A & J Auto Repair Corporation's Notice of Motion for an order reopening the record of a hearing to allow for the introduction of evidence regarding the matter at issue, and upon petitioner Arismendi Blanco's application to vacate a default determination issued on September 19, 1991, and upon the letters of Michael Yastrab, C.P.A., received March 9 and 30, 1992, respectively, and upon the letter of Kevin A. Cahill, Esq., dated April 6, 1992, in opposition to said motion and application, the following facts are found:

On October 9, 1987, the Division of Taxation issued two notices of determination and demands for payment of sales and use taxes due to petitioner A & J Auto Repair Corporation ("A & J") for the period March 1, 1984 through February 28, 1987. On the same date, the Division of Taxation issued two additional notices of determination and demands for payment of sales and use taxes due spanning the same period as above to petitioner Arismendi Blanco, as officer of A & J. During the audit of A & J, which commenced in February 1987 and concluded in September 1987, petitioner A & J's representative, Michael Yastrab, informed the auditor that Mr. Blanco had recently moved to Florida and his address was unknown.

In response to the notices of determination, petitioners filed a request for conciliation conference on October 21, 1987. The request was executed by Michael Yastrab, as representative, and indicated the address for both A & J and Mr. Blanco to be the offices of Michael Yastrab, C.P.A., 330 Seventh Avenue, New York, New York 10001. Following the

conference held on November 30, 1988, at which petitioners appeared by Michael Yastrab, a conciliation order was issued on March 24, 1989.

On June 8, 1989, petitioners filed a petition with the Division of Tax Appeals. The petition was signed by Michael Yastrab, as representative. The addresses of petitioners were again stated to be the office of Mr. Yastrab.

On September 21, 1989, A & J filed, through Mr. Yastrab, a corporate power of attorney with the Division of Tax Appeals in which the corporation appointed Mr. Yastrab to represent it in this proceeding. Mr. Blanco executed the power of attorney on August 1, 1989 as president of A & J. The power was acknowledged in the State of Florida, County of Broward. No power of attorney appointing Mr. Yastrab to represent Mr. Blanco, individually, was filed.

The case was set down for hearing on January 15, 1991 at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, at 9:15 A.M. The hearing took place at that time, before Thomas C. Sacca, Administrative Law Judge. At said hearing, petitioner A & J appeared by Michael Yastrab, CPA. The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel). The Division presented one witness, Theodore Bernstein, an auditor. A & J presented the testimony of Michael Yastrab in support of its petition and also submitted two exhibits in support thereof.

Each party was given an opportunity to submit briefs and/or summary statements in this matter; however, each elected not to file briefs and only the Division's representative offered a closing argument. Petitioners were provided with 30 days within which to submit a power of attorney for Mr. Blanco and a letter advising both Mr. Cahill and the Administrative Law Judge either of Mr. Blanco's address or Mr. Yastrab's inability to locate such address. Mr. Yastrab indicated that he would know within a few days of the hearing whether he had Mr. Blanco's address, and then stated, "Either I'll have his Florida address in the office, I know I spoke to him." No correspondence was received from Mr. Yastrab following the hearing.

At the commencement of the hearing, the parties were advised by the administrative law judge that the only evidence upon which the determination could be based was upon the

evidence submitted at the hearing. Petitioner's representative was also asked, at the conclusion of the testimony, if he wished to submit any further evidence before the record was closed, to which he responded, "No". At no time during the course of the hearing did Mr. Yastrab indicate a desire to have Mr. Blanco testify.

On September 19, 1991, a determination was issued by Administrative Law Judge Sacca in this matter, sustaining the notices issued to A & J and defaulting Mr. Blanco for his failure to appear at the hearing. The motion to reopen the record was received by the Division of Tax Appeals on March 9, 1992 and the application to vacate the default was received by the Division of Tax Appeals on March 30, 1992.

In both the motion to reopen the hearing and the application to vacate the default, petitioners submitted the identical unsworn allegations of Mr. Yastrab in support of their position. The statements allege the following:

- a. Four years passed between the end of the period under audit and the scheduling of the hearing.
- b. During the four-year period, Mr. Blanco had moved to Florida and taxpayers' representative had moved twice. As a result of the moves and the passing of time, some records were lost and Mr. Blanco's whereabouts were no longer known to Mr. Yastrab.
- c. Mr. Blanco has information that would establish that the audit of the Division of Taxation was in error.
- d. During 1991, the Division of Taxation and the Division of Tax Appeals were aware of Mr. Blanco's location in Florida. In support of this allegation, petitioners' representative submitted a copy of a letter addressed as follows:

Arismendi Blanco
3810 Northwest 81st Terrace
Coral Springs, Florida 33065-2927

The letter was dated December 10, 1991 and written by Ms. Roberta Moseley Nero, Secretary to the Tax Appeals Tribunal. The purpose of the letter was to advise Mr. Blanco of the administrative law judge determination, the exception filed by A & J and the lack of an

exception on his behalf due to the absence of a power of attorney appointing anyone to represent him.

On November 8, 1991, an exception to the administrative law judge's determination was received by the Tax Appeals Tribunal. Correspondence among Mr. Yastrab, Mr. Cahill and the Secretary to the Tribunal reveals that such exception is being held in abeyance pending the outcome of the instant motion and application.

On December 5, 1991, Ms. Roberta Moseley Nero obtained Mr. Blanco's Florida address through a disclosure request directed to the Internal Revenue Service's Disclosure Office of the Albany District. Prior to this date, the Division of Tax Appeals was unaware of Mr. Blanco's address in Florida.

On February 3, 1992, Andrew Marchese, Supervising Administrative Law Judge, advised Mr. Yastrab of the requirements for filing an application to vacate a default by directing him to 20 NYCRR 3000.10(b)(3).

CONCLUSIONS OF LAW - MOTION TO REOPEN

A. The regulation at 20 NYCRR 3000.5 discusses the general procedure and parameters of motion practice before the Tribunal. The instant motion is not specifically addressed by said section, but is allowable pursuant to 20 NYCRR 3000.5(a) which states, in pertinent part, as follows:

"To better enable the parties to expeditiously resolve the controversy, this Part permits an application to the tribunal for an order, known as a motion, provided such motion is for an order which is appropriate under the Tax Law and the CPLR...."

CPLR 4404(b) and following sections are applicable and are held to govern the instant situation (see 20 NYCRR 3000.5[a][6]).

B. CPLR 4404(b) provides as follows:

"Motion after trial where jury not required. After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue."

The general scope of CPLR 4404 has been commented upon as follows:

"CPLR 4404 is designed to unify the motion for new trial with that for judgment notwithstanding the verdict or decision. A CPLR 4404 motion is inapplicable unless there has been a verdict by a jury, a decision by a court sitting without a jury, or a hung jury. It is predicated on the assumption that the judge who presides at the trial--whether jury...or nonjury...is in the best position to evaluate errors at the trial, if the motion is made while his recollection is fresh." (4 Weinstein-Korn-Miller, NY Civ Prac ¶ 4404.1.)

Clearly, the instant motion appeals to the discretion of the trial judge.

"The Trial Judge must decide whether substantial justice has been done...and must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision" (see Micallef v. Miehle Co., 39 NY2d 376, 381, 384 NYS2d 115, 118).

C. When a petitioner avails itself of its right to petition an assessment, it is incumbent upon that petitioner to prepare for formal hearing and to carry its burden of proof. (20 NYCRR 3000.10[d][4].) Even though petitioner A & J in this matter had approximately 26 months, post conference, to prepare for hearing and was afforded several hours to present its case before the Administrative Law Judge, it becomes apparent that petitioner failed to adequately prepare or present the case. "[W]here a party fails to adequately prepare for trial, he is not entitled to another trial" (see, Grossbaum v. Dil-Hill Realty Corp., 58 AD2d 593, 395 NYS2d 246, 248). As to the substance of the motion, petitioner only alleges in an unsworn statement that Mr. Blanco's testimony was important to the corporation's case and that petitioner would have been successful if Mr. Blanco was aware of the hearing and had testified. There is, however, no argument in the moving papers that Mr. Yastrab availed himself of steps to obtain and present the testimony of Mr. Blanco (or that such steps were unavailable). There is also nothing in the letter of Mr. Yastrab to indicate the nature of the information which Mr. Blanco is alleged to possess that would have an impact upon the determination in this matter. Petitioner only claims that New York State was aware of Mr. Blanco's location but failed to notify Mr. Blanco of the hearing or Mr. Yastrab of Mr. Blanco's whereabouts.

D. There is no evidence presented by petitioner A & J that anyone within the Department of Taxation and Finance was aware of Mr. Blanco's address in Florida prior to December 5, 1991, when the Secretary to the Tax Appeals Tribunal contacted the Internal Revenue Service.

In fact, from the time of the audit through the entire hearing process, Mr. Yastrab was unable or unwilling, despite repeated requests, to provide the Division of Taxation and the Division of Tax Appeals with Mr. Blanco's address in Florida. Instead, Mr. Yastrab maintained throughout the administrative process that all documents relating to Mr. Blanco be sent to Mr. Yastrab's office. Therefore, it is determined that the Department of Taxation and Finance was unaware of Mr. Blanco's address in Florida until December 5, 1991, well after the hearing in this matter was held and the determination issued, and that it was proper to mail the Notice of Hearing to Mr. Yastrab's office, as this was the only address provided by A & J's representative to the Division of Tax Appeals.

E. Mr. Yastrab's claim that he was unaware of Mr. Blanco's whereabouts must be questioned in light of the facts contained in this record. During the course of the audit, which commenced in February 1987 and concluded in September 1987, Mr. Yastrab advised the auditors that Mr. Blanco had recently moved to Florida and his address was unknown. Mr. Yastrab continued to maintain this position during the hearing and in his motion papers. However, two years after the audit was completed, in August 1989, Mr. Yastrab was able to obtain from Mr. Blanco a corporate power of attorney which was signed and acknowledged in Florida. In addition, during the course of the hearing, in discussing whether he would be able to provide Mr. Blanco's address to both the Division of Taxation and the Division of Tax Appeals, Mr. Yastrab stated, "Either I'll have his Florida address in the office, I know I spoke to him." (Emphasis added.) In light of all the facts and circumstances, it appears that Mr. Yastrab was aware of Mr. Blanco's whereabouts throughout the administrative process but was unwilling to provide such information.

F. Petitioner's motion seeks, at best, to utilize the determination of the Administrative Law Judge issued on September 19, 1991 as a guide for reopening a hearing for which petitioner was apparently underprepared and unwilling to present Mr. Blanco as a witness. Petitioner's motion to reopen appears in fact to be a request to present evidence that was available to Mr. Yastrab at the time of the hearing, but was not presented as part of what

appears to have been a continuing effort to shield Mr. Blanco's whereabouts from the Division of Taxation. Finally, and at worst, petitioner's motion may be an attempt to delay the administrative hearing process. In the interest of fairness, petitioner's motion to reopen must be denied. To rule otherwise would be a mockery of the administrative process and frustrate the very purpose of the regulations of the Tax Appeals Tribunal, i.e., "to provide the public with a clear, uniform, rapid, inexpensive and just system of resolving controversies with the Division of Taxation" (20 NYCRR 3000.0[a]).

G. Accordingly, in my discretion, I find that substantial justice was done with regard to the petitioner in this case, and based upon my experience and sense of fairness, petitioner's motion to reopen the record to allow for the introduction of evidence regarding the matters at issue and for reargument is denied with prejudice (Micallef v. Miehle Co., *supra*; CPLR 4404[b]).

CONCLUSIONS OF LAW - APPLICATION TO VACATE

H. The Tax Appeals Tribunal's Rules of Practice and Procedure provide, at 20 NYCRR 3000.10(b)(3), as follows:

"Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case."

Mr. Yastrab alleges that petitioner Mr. Blanco failed to appear at the hearing on September 19, 1991 because Mr. Yastrab was unaware of Mr. Blanco's whereabouts and the Division of Tax Appeals, although aware of Mr. Blanco's address, failed to notify either Mr. Blanco of the scheduled hearing or Mr. Yastrab of Mr. Blanco's location. As previously discussed, the Division of Tax Appeals was provided only with Mr. Yastrab's office address and was unaware of Mr. Blanco's whereabouts until after the determination in this matter was issued and an exception filed. In addition, it appears that Mr. Yastrab was aware of Mr. Blanco's whereabouts throughout the administrative hearing process (*see*, Conclusions of Law "D" and "E"). Thus, these excuses have no merit.

At no time has petitioner Arismendi Blanco produced any evidence of a meritorious case

in spite of his representative's having been directed to the appropriate regulation by Andrew Marchese, Supervising Administrative Law Judge, in his letter of February 3, 1992. Petitioner has thus failed to meet either requirement of 20 NYCRR 3000.10(b)(3). Therefore, the request to vacate the default of Mr. Blanco is denied and that portion of the determination issued on September 19, 1991 to Mr. Blanco is sustained.

In conclusion, it is ordered that petitioner A & J's motion for reargument is denied with prejudice and petitioner Arismendi Blanco's request to vacate the default order is denied and Mr. Blanco's determination of default issued September 19, 1991 is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE